85350-9
No. 38411-6-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

VISION ONE, LLC, Plaintiff and Respondent,

v.

RSUI, Intervenor Below and Appellant,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
Defendant and Respondent,

v.

D&D CONSTRUCTION, INC.; Defendant, Third-Party Plaintiff,
Defendant and Respondent,

v.

BERG EQUIPMENT & SCAFFOLDING CO., INC., Third-Party
Defendant and Respondent

Brief of Respondent Berg Equipment & Scaffolding, Inc.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

I. INTRODUCTION

RSUI was no stranger to this case when it received notice of the parties' settlement agreement. Indeed, RSUI was aware of this claim as early as 2006, more than three years before the parties negotiated the settlement agreement at issue. Berg's counsel was in continuous contact with RSUI during the year leading up to the February 2008 mediation, providing RSUI with confidential status reports and involving RSUI in key strategic decisions. Prior to the February 2008 mediation, RSUI's counsel visited the offices of Berg's defense counsel and was given access to the entire file. RSUI received Berg's mediation materials, including Berg's confidential statement to the mediator. RSUI's counsel attended the mediation, but it had become clear that RSUI was denying coverage. RSUI was aware that its complete refusal to meaningfully participate in the mediation would likely result in an assignment, but did nothing to assist Berg in settling the claim. Instead, RSUI chose to abandon Berg just weeks before trial knowing full well that Berg was facing $10 million of exposure and possessed only $1 million of primary insurance coverage. When the February 2008 mediation was unsuccessful, RSUI never requested additional information from Berg concerning the status of the case. It is disingenuous of RSUI to blame Berg for its own failure to stay apprised of the litigation.

After the February 2008 mediation, Berg participated in seven months of vigorous, arms' length negotiations with the assistance of a mediator which ultimately resulted in a settlement. RSUI's challenge of the settlement's reasonableness is nothing more than a last ditch effort to cover up its improper

denial of coverage and mishandling of the claim. The reasonableness of the underlying settlement is supported by substantial evidence. Moreover, the record is devoid of any evidence of fraud or collusion on the part of the settling parties. RSUI's desire to conduct a fishing expedition in hopes of uncovering such evidence did not entitle it to a continuance of the reasonableness proceedings. Because the trial court did not abuse its discretion in approving the reasonableness of the settlement or in denying RSUI's request for a continuance, this Court should affirm.

II. COUNTER-STATEMENT OF ISSUES

1. Did the trial court abuse its discretion in approving the reasonableness of the settlement where the trial court applied the *Chaussee* factors and the reasonableness determination was supported by substantial evidence?

2. Did the trial court abuse its discretion by denying RSUI's motion for continuance where RSUI had six days notice of the reasonableness hearing and where there was no evidence that allowing RSUI to conduct additional discovery would have uncovered fraud or collusion on the part of the settling parties?

3. Should RSUI's references to evidence outside the appellate record be stricken?

III. COUNTER-STATEMENT OF THE CASE

A. RSUI Had the Opportunity to Be As Involved As It Wanted to Be.

This litigation arose out of a shoring collapse at a construction project owned by Vision One. CP 5-12; 35-38; 69-79; 607-614; 618-626. D&D, Inc.

was the concrete subcontractor, Berg was the shoring supplier, Admiral Insurance Company ("Admiral") was Berg's primary carrier, RSUI was Berg's excess carrier, and Philadelphia Indemnity Insurance Company ("Philadelphia") was Vision One's carrier. Vision One's action against Philadelphia, D&D, Inc. and Berg was ultimately consolidated with two additional actions relating to the collapse, including a bodily injury action filed by Matthew Thompson. CP 39-45.

From the outset of this case, Berg kept RSUI apprised of the litigation. 9/12/2008 RP 11: 17-19. Berg's defense counsel was in continuous contact with RSUI's claims representative, Don Frye, and had been providing him with all status reports for over a year. 9/12/2008 RP 11: 19-20; CP 337. RSUI was even involved in key decisions such as the consolidation of the cases arising out of the collapse. 9/12/2008 RP 11: 20-22; CP 337.

In January of 2008, after significant discovery and motion practice and with the March 2008 trial date fast-approaching, the parties agreed to mediation before Dale Kingman. CP 332. RSUI was apprised of this mediation. CP 332. Shortly thereafter, Berg's defense counsel was contacted by attorney Mike Helgren of McNaul Ebel Nawrot & Helgren advising Berg that he was representing RSUI in this matter. CP 332. Mr. Helgren wrote to Berg's counsel on January 16, 2008, asking for all defense counsel's status reports, all correspondence between the parties, and all interrogatory responses. CP 332, 335. Berg's defense counsel responded to Mr. Helgren by letter dated January 20, 2008, expressing surprise at Mr. Helgren's request because Berg had been supplying RSUI with information for over a year. 9/12/2008 RP 12: 1-5; CP 333,

337. Nevertheless, Berg's counsel offered to make its complete file available for RSUI's review. 9/12/2008 RP 12: 5; CP 333, 337.

On February 5, 2008, one of RSUI's attorney's, David East, came to the office of Berg's defense counsel to conduct a document review. CP 427. Mr. East spent approximately two hours in a conference room reviewing those documents and tagging the same for copying. CP 427. Mr. East then made arrangements to have the tagged documents, as well as all of the pleadings, motion papers, and written discovery, copied by an outside copy service. CP 427. Mr. East was advised that any future requests to review documents should be coordinated through Berg's personal counsel, Peter Petrich. CP 427. From February 5, 2008, until the time of the reasonableness proceedings, Berg's defense counsel did not receive any further requests from RSUI, either through RSUI's counsel or through Mr. Petrich, requesting review of any additional documents maintained at the office of Berg's defense counsel. CP 428.

When the parties mediated in February of 2008, Vision One was seeking $5.7 million in damages. CP 3347, 3363, 3366. This amount did not include the $4 million being sought by Matthew Thompson for his allegedly disabling physical and psychological injuries. CP 2724-29, 3568, 10601. RSUI was fully apprised of the February 2008 mediation and received Berg's mediation materials, including Berg's confidential statement to the mediator, Mr. Kingman. CP 333, 340. The mediation went forward over a two day period on February 6 and 7, 2008. CP 333. Mr. Helgren was present during the entire mediation. CP 333. Berg's personal counsel, Peter Petrich, conferred with Mr. Helgren during the

mediation, and informed him that the absolute refusal of RSUI to participate in the mediation would probably result in Berg considering an assignment of its claim against RSUI in any settlement negotiations. 9/12/2008 RP 13: 1-8. To the best of Berg's knowledge and belief, RSUI never provided any authority to or assistance with settling the claims. CP 333. Instead, RSUI abandoned its insured in its hour of need. The mediation was unsuccessful. 9/12/2008 RP 12: 10-21; CP 333.

B. RSUI Knew That Its Refusal to Participate in the February 2008 Mediation Could Result in the Negotiation of an Assignment.

On February 19, 2008, Berg received a demand from Vision One. CP 343. The demand included a stipulated judgment against Berg for $2.5 million which was broken down as follows: $1 million payable by Admiral, $500,000 payable by Berg personally, and the remaining $1 million payable only by RSUI with a covenant not to execute on any other assets of Berg other than the RSUI policy. CP 333, 342-43. Berg forwarded the same to RSUI's representative, Don Frye. CP 333, 342-43. RSUI's counsel asked Berg's counsel whether these particular terms were acceptable to Berg, and Berg's counsel indicated that they were not. CP 7016. Thereafter, RSUI never made any request of Berg's counsel for information regarding the issues or facts of the case, and RSUI did not provide any assistance or input as the case moved toward trial. 9/12/2008 RP 13: 17-22; CP 333. It was Berg's understanding that RSUI was denying coverage. CP 333. Mr. Helgren did contact Berg's personal counsel requesting more information regarding why Berg thought there was coverage under the RSUI policy, but

because RSUI had already denied coverage, Berg's personal counsel did not think it was appropriate for him to respond. 9/12/2008 RP 13: 9-16. Berg's personal counsel took the position that it was RSUI's job to investigate and evaluate coverage under the RSUI policy, not Berg's job to convince RSUI that coverage existed. 9/12/2008 RP 13: 13-14, 15: 24 - 16: 2.

C. There Were Substantial Developments Between the February 2008 Mediation and the September 2008 Settlement.

During the time between the mediation and the September 2008 settlement, Vision One and Berg were engaged in a vigorous and contentious battle over Berg's liability, with both sides having brought and defended against numerous hard-fought motions for summary judgment and to exclude evidence. CP 189; 1520-1535; 3038-3050; 3960-3967; 4659-4673; 4732-4739; 4905-4917; 4989-4992; 5469-5474; 5664-5668; 5669-5675; 6126-6156; 6190-6251; 6481-6485. The substantial motion practice significantly increased the parties' trial preparedness but did little to reduce the number of complex issues for trial.

In addition, just one week prior to the parties' settlement agreement, another personal injury lawsuit was filed against Berg, wherein the plaintiff demanded $800,000. 9/12/2008 RP 44: 1-2. There were also between 8 and 9 additional bodily injury claimants that had yet to file suit and the statute of limitations had yet to expire. 9/12/2008 RP 45: 11-17. These claims were above and beyond the $4 million claim by Matthew Thompson. 9/12/2008 RP 44: 2-6. Consequently, Berg was facing approximately $10 million of exposure with only $1 million of primary coverage available. CP 329. Even if Berg were only found 25% - 33% at fault, its excess exposure would be approximately $3.5 million, an

amount that would bankrupt the company unless there was a successful bad faith claim. CP 329-330.

D. The Settling Parties Reached a Settlement and Sought Court Approval of Its Reasonableness.

After seven months of hard-fought, arms' length negotiations with the assistance of mediator, Dale Kingman, Vision One and Berg reached a settlement agreement on September 5, 2008. CP 208. Berg's primary insurer, Admiral, agreed to pay Vision One its policy limits of $1 million, and the parties agreed to a $2.3 million covenant judgment enforceable only against RSUI. CP 213. Vision One pledged its own assets and its liability insurance for all bodily injury liabilities, and agreed to indemnify and hold Berg harmless against such claims. CP 214. The settlement was conditioned on court approval and a reasonableness determination. CP 215-16.

On September 9, 2008, Vision One gave RSUI notice of the proposed settlement and moved for court approval of the settlement's reasonableness. CP 187-205. The reasonableness hearing was scheduled for September 12, 2008. 9/9/2008 RP 83-84. In turn, RSUI filed a Motion to Intervene In and to Continue Reasonableness Hearing. CP 385-391.

At the September 12, 2008, reasonableness hearing, RSUI's counsel, David East, claimed to "know nothing of this case". 9/12/2008 RP 9: 2-4. RSUI argued that it had been "kept in the dark" and "excluded from settlement negotiations since February 2008". CP 6893; 6895. In fact, Mr. East had known of the case for some time, and even came to the offices of Berg's defense counsel to review the file prior to the February 2008 mediation. CP 427. The Court

allowed RSUI to intervene for the sole purpose of contesting the settlement. 9/12/2008 RP 11: 2-4, CP 485. The Court gave RSUI the weekend to "do whatever it need[ed] to do, homework-wise", to determine whether the terms of the settlement were reasonable. 9/12/2008 RP 11: 5-6, 53-12-13. The Court made it clear that it felt it was "RSUI's burden to show that there's some kind of fraud or collusion" and that it was "a pretty high burden." 9/12/2008 RP 54: 1-2, 56: 14-15. The Court continued the hearing until the afternoon of Monday, September 15, 2008. 9/12/2008 RP 55: 15-16.

At 4:08 p.m. on Friday, September 12, 2008, the legal assistant to Mr. East and Mr. Helgren sent an email to Berg's counsel requesting that they forward all information pertaining to the liability of Berg, the claims against Berg that have been resolved in the proposed settlement, and how the figure of $3.3 million was determined, to RSUI's counsel via email by 9:30 a.m. on Monday, September 15, 2008. CP 456. Berg's defense counsel and Berg's personal counsel both responded to Mr. East. CP 458-59, 461. Despite the overly burdensome nature of RSUI's request, Berg's counsel did offer to make their records available for review over the weekend. CP 458, 461. RSUI did not review those records prior to the September 15, 2008, hearing. 9/15/2008 RP 33: 6-17.

E. The Settling Parties Submitted Substantial Evidence Demonstrating the Settlement Was Reasonable and Negotiated at Arms' Length.

The settling parties submitted, and the Court considered, substantial evidence demonstrating the reasonableness of the settlement. Randy Aliment, the

attorney who took the lead in the settlement negations on behalf of Vision One, declared as follows:

> The settlement negotiations in this case were complicated by the fact that Berg's primary insurance policy has a limit of $1,000,000 and its excess carrier, RSUI, denied coverage early on and refused to participate in settlement negotiations despite our urging them to do so. Although RSUI's counsel was aware of the litigation and the settlement effort, and did attend the mediation with Mr. Kingman, RSUI has refused to participate any further and has remained consistent in its outright denial of coverage. Significantly complicating the negotiations was the existence of several bodily injury claims and the prospect of the parties' exposure to damages over and above policy limits.
>
> In my 28-year legal career, I have been involved in numerous complicated and lengthy settlement negotiations in multi-million dollar cases. This case stands out in my mind as one of the more difficult I have ever handled. Berg's counsel, Mr. Mullin, is a tenacious and effective litigator. He is an equally skilled advocate at the settlement table. Many of my settlement discussions and communications involved Berg's personal counsel, Peter Petrich, who remained fully involved up to his approval of the final draft of the settlement agreement. The settlement negotiations were hard-fought and protracted. Many times I seriously questioned whether the case would ever settle because the parties were so entrenched in their respective positions. As this Court is well aware of how fiercely this case has been litigated, it should be no surprise to learn that the settlement discussions were of a similar nature. Needless to say, at no time has there been any collusion between Berg and Vision regarding any aspect of this case, including negotiation of the settlement agreement attached to this Declaration.

CP 208-09.

> Similarly, Roger Hebert, Vision One's principal, stated as follows:
>
> The negotiations with Berg have been very time consuming, intense and hard-fought. We had a mediator starting in early 2008 who has continued to work on the case up to the time of settlement. There were extensive multi day meetings in which various options for settlement were explored and then additional follow-up meetings were held as well. The negotiations were complicated by the one million dollar limits of Berg's primary insurer (Admiral)

and the refusal of Berg's excess carrier (RSUI) to accept coverage. Berg's limited assets and the outstanding bodily injury claims further complicated negotiations. There have been numerous iterations of settlement agreements. At every turn, Berg's counsel has fought for changes they believed benefited their client.

This litigation has been very expensive, with more expenses to come. This case is very expert-intensive and we have had to retain multiple experts. Additionally, many depositions of both fact and expert witnesses have been taken. Because our own insurance coverage is a wasting policy, the more litigation expenses that are incurred means a greater chance that additional Vision One assets, in addition to amounts incurred for attorneys' fees, costs and expert witness fees, will be at risk (because of several bodily injury claims that have been filed and/or threatened) and we are trying to avoid this situation.

We would like to turn our efforts back to our business. This litigation has been very time consuming both for the principals of Vision One, LLC and our employees.

I believe that both Philadelphia and RSUI have pursued their own self-interests, leaving Vision One, LLC to fend for itself. Because of this, Vision One has pursued the best course possible. The result of these efforts is the settlement agreement with Berg. I believe this settlement is reasonable and should be approved by this Court.

CP 224-25.

In addition, the settling parties submitted the Declaration of Berg's personal counsel, Peter Petrich, which provided as follows:

The subject settlement agreement is the product of 61.50 hours of my time alone. I am confident that Dan Mullin has expended considerable more hours on the settlement negotiations that have been adversarial and conducted at arms length. At no time has there been any collusion between Berg and Vision One regarding any aspect of this case, much less the settlement negotiations.

Throughout this litigation Berg's primary concern has been to eliminate any exposure to the company above its insurance policy limits of the one million dollars. Toward this end, Mr. Mullin and I have thoroughly discussed and analyzed Vision One's claims, D&D's claims and the potential personal injury claims. As part of

this analysis we considered the fact that RSUI, Berg's excess carrier, had denied coverage in April 2007. Of course, we have also thoroughly weighed the merits of Berg's defense. After an exhaustive analysis I believe the settlement is fair and reasonable.

Vision One's total claims amount to approximately $5.5 million dollars. Although I believe that Berg's defense to these claims is solid, even if Berg were found to be 25% - 33% at fault, the company's excess exposure would bankrupt the company unless there was a successful bad faith claim against RSUI.

The potential outstanding bodily injury claims were a substantial concern in evaluating the settlement terms. The amount of these potential claims are almost impossible to calculate with any degree of objectivity because the number of claimants is not known. However, those that have joined in the litigation to date have aggregate claims of nearly $5 million. The statute of limitations expires on October 1, 2008, so additional suits could be filed. Again, as with the construction damages claims, even if Berg was found to be 25% - 33% at fault, the company's exposure exceeds its net assets.

Berg's potential exposure could be well over $3.5 million. Consequently, the settlement is entirely reasonable when Vision One agrees to accept Admiral's policy limits of One Million dollars and a judgment against Berg for $2.3 million in consideration of a complete release and indemnification of any and all claims, together with an assignment of Berg's rights against RSUI and an agreement not to execute against Berg on the judgment.

By accepting Berg's assignment of its bad faith claim against RSUI, Vision One is relieving Berg of the additional expense of that litigation as well as the possibility of an adverse verdict.

The protracted negotiations and compromise demonstrate that the parties did not collude to defraud any insurer.

CP 329-30.

The Court also considered the Declaration of Edward Berg with respect to Berg's finances, as well as the declarations of Berg's defense counsel, the declarations of RSUI's counsel and the declaration of RSUI's claims

representative, Don Frye. CP 331-344, 426-433, 447-452, 453-474, 492-495, 6688-6717; 9/15/2008 RP 42: 25. After reviewing the voluminous submissions of the parties, and hearing argument from all counsel, including counsel for RSUI, the trial court found that the record contained ample evidence of the settlement's reasonableness under *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983), and *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC,* 145 Wn.App. 698, 187 P.3d 306 (2008). 9/15/2008 RP 52:19 – 55:10; CP 483-487.

F. The Trial Court Found that the Record Was Replete with Evidence that the Settlement Negotiations Were Contentious and Conducted at Length, and Completely Lacking in Evidence of Bad Faith, Fraud or Collusion on the Part of the Settling Parties.

On September 15, 2008, the Court approved the reasonableness of the parties' settlement agreement, and denied RSUI's request for a continuance. CP 483-487. During her oral ruling, Judge van Doorninck stated as follows:

> I think that the record is replete with what's gone on for the many months that this case has been going on, and certainly, I've been aware of it for the last—since February, I guess, of how contentious it is, I believe that this Court does have the authority to approve the settlement agreement.
>
> * * *
>
> So I looked again at the *Issaquah Heights* case. **I don't think there's any evidence of bad faith or collusion or fraud. There just absolutely isn't any evidence of that. I think this has all been very hard fought and difficult.**
>
> Then there are the additional factors under *Glover*, and I'll just talk about some of those because I think they've also been met, whether that's required or not.

The first is the releasing person's damages, and I think the evidence is clear that there are some negotiations in regards to the actual damages in releasing—in the releasing person's damages, the merits of the releasing person's liability, and the released person's relative fault. And those things are such a huge question of fact, and have been—we've argued about those facts at every legal issue that I had to decide. It's clearly, hotly contested.

The risk and the expenses of continued litigation, I think, is very high. This is very expert-intense litigation, and we had originally mapped out six weeks for it, and that, obviously, is very expensive and difficult.

The released person's ability to pay. I think Berg's declaration makes it clear that Berg has done what they could, and would certainly have no ability to pay, at least with liquid assets. **Again, the *Glover* factors include bad faith, collusion, or fraud. Again, no evidence of that.**

Then the extent of the releasing person's investigation and preparation of the case, and this is extreme, in terms of preparation and investigation. I don't know how to say it any differently, but **I think the record speaks for itself that there has been an awful lot of investigation and preparation, and the interest of the parties that are arguing against this, RSUI, and I think that they've been able to be involved as much as they wanted to. I don't think that it's Berg's responsibility to continually ask them to provide coverage. I think once an insurance company says, we're denying coverage, you don't have to keep working with them, necessarily.**

* * *

I just think in fairness, and in equity, I think that the settlement was clearly worked on over many, many hours, and hotly contested there, as well.

But I will approve the settlement. I think it's appropriate to release Berg from all obligations, and move forward between Vision One and Philadelphia in terms of trial.

9/15/2008 RP 52:19 – 55:10. This appeal followed. CP 500-518.

IV. ARGUMENT

A. The Standard of Review Is Abuse of Discretion.

A trial court's reasonableness determination is reviewed for abuse of discretion. *Werlinger v. Warner,* 126 Wn.App. 342, 349, 109 P.3d 22, *review denied,* 155 Wn.2d 1025, 126 P.3d 820 (2005). A trial court's ruling on a motion to continue a reasonableness hearing is likewise reviewed for abuse of discretion. *Howard v. Royal Specialty Underwriters, Inc.,* 121 Wn.App. 372, 379, 89 P.3d 265 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

B. The Trial Court Did Not Abuse Its Discretion in Approving the Reasonableness of the Settlement.

The Washington Supreme Court has provided appellate courts with a road map for reviewing reasonableness determinations, instructing them to consider nine factors. *Chaussee v. Maryland Cas. Co.,* 60 Wn.App. 504, 803 P.2d 1339, *review denied,* 117 Wn.2d 1018, 818 P.2d 1099 (1991). The nine *Chaussee* factors are:

(1) The releasing person's damages;

(2) The merits of the releasing person's liability theory;

(3) The merits of the released person's defense theory;

(4) The released person's relative faults;

(5) The risks and expenses of continued litigation;

(6) The released person's ability to pay;

(7) Any evidence of bad faith, collusion, or fraud;

(8) The extent of the releasing person's investigation and preparation of the case; and

(9) The interests of the parties not being released.

Id. at 513. No single criterion controls and all nine are not necessarily relevant in all cases. *Besel v. Viking Ins. Co.,* 146 Wn.2d 730, 739 n. 2, 49 P.3d 887 (2002). A reasonableness hearing necessarily involves factual findings which will not be disturbed on appeal if substantial evidence supports them. *Schmidt v. Cornerstone Investments, Inc.,* 115 Wn.2d 148, 158, 795 P.2d 1143 (1990). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill,* 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

1. The Trial Court's Finding of No Fraud or Collusion Is Supported by Substantial Evidence.

RSUI erroneously contends that the trial court abused its discretion in making a finding of fact that "[t]here is no evidence of fraud or collusion in the settlement herein." CP 505; Appellant's Brief at p. 25. RSUI claims that this finding was error because it purportedly presented "substantial circumstantial evidence of fraud and collusion." *See* Appellant's Brief at p. 25. Contrary to RSUI's assertion, the only thing RSUI presented to the trial court was speculation and innuendo. A court may not infer bad faith, collusion or fraud based on speculation and innuendo alone. *Martin v. Johnson,* 141 Wn.App. 611, 623, 170 P.3d 1198 (2007). Moreover, for the purposes of this appeal, the appropriate question is not whether RSUI presented substantial evidence of fraud or collusion, but rather, whether there was a sufficient quantity of evidence in the record to

persuade a fair-minded, rational person that there was ***no*** fraud or collusion. Because the trial court's finding of fact is supported by substantial evidence, and because RSUI's attempts to create a specter of fraud and collusion are based merely on speculation and innuendo, the trial court's finding of no fraud or collusion should not be disturbed on appeal.

a. There was a sufficient quantity of evidence in the record to persuade a fair-minded, rational person that there was no fraud or collusion.

It is well-settled that where, as here, an insurer refuses to settle the claim, the insured, without the insurer's consent, can negotiate a settlement with the claimant. *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings,* 128 Wn.App. 317, 322, 116 P.3d 404 (2005); *Chaussee,* 60 Wn.App. at 509-10. At the February 2008 mediation, RSUI left Berg high and dry despite knowing that it was facing approximately $10 million of exposure and had only $1 million of primary coverage. Having been abandoned by RSUI, Berg was left alone to negotiate a settlement that would protect it from financial ruin. CP 329-330. The declarations submitted by the parties establish that the settlement was the result of seven months of vigorous, arms' length negotiations conducted with the assistance of a mediator. CP 208-09, 224-25, 329-30, 331-33, 426-33, 7035-38. Moreover, having presided over the case from February to September of 2008, Judge van Doorninck was more than familiar with the strengths and weaknesses of the parties' liability and defense theories, the amount of damages at stake, the parties' preparedness for trial, and the overall contentious nature of the litigation. CP 189; 3038-3050; 3346-3361; 3611-3623; 3778-3801; 3960-3967; 4212-4223;

4231-4238; 4401-4406; 4659-4673; 4732-4739; 4905-4917; 4922-4926; 4933-4937; 4989-4992; 5080-5109; 5159-5173; 5324-5325; 5334-5354; 5355-5367; 5384-5389; 5390-5393; 5425-5430; 5469-5474; 5528-5549; 5664-5668; 5669-5675; 6126-6156; 6190-6251; 6288-6329; 6330-6350; 6427-6469; 6481-6485. Because there was a sufficient quantity of evidence in the record to persuade a fair-minded, rational person that there was no fraud or collusion on the part of the settling parties, the trial court did not abuse its discretion and this Court should affirm the trial court's ruling.

b. <u>There is nothing suspicious about the timing of Berg's decision to discontinue its cooperation with RSUI.</u>

RSUI would have this Court believe that Berg had been communicating regularly with RSUI for almost a year despite a purported denial of coverage in April of 2007. However, the timing of RSUI's denial is not as clear cut as RSUI makes it out to be. RSUI's own counsel admits that none of the communications from RSUI to Berg contained an outright denial of coverage. 9/12/2008 RP 15:10-18. Indeed, RSUI's counsel represented to the trial court that he had closely reviewed the correspondence between RSUI and Berg, and "that in every instance, Mr. Fry[e] informed the insured: Under the facts you presented to me, I don't see coverage. Here's the reasons why...It was never an outright: There is no coverage. Period." 9/12/2008 RP: 10-18. Because it was less than clear whether RSUI had denied coverage or was continuing to handle the case under a reservation of rights, Berg continued to keep RSUI fully apprised leading up to the February 2008 mediation. CP 332; 9/12/2008 RP 11:17-24.

In January of 2008, Mike Helgren of McNaul Ebel Nawrot & Helgren contacted Berg's defense counsel to advise him that he was representing RSUI, and to request all defense counsel's status reports, all correspondence between the parties, and all interrogatory responses. CP 332, 335. Berg's defense counsel was surprised by this request because Berg had been supplying RSUI with information, including all status reports, throughout the course of the litigation. CP 333. Nevertheless, Berg's defense counsel advised RSUI's counsel that he would make the complete file available for his review. CP 333, 337. On February 5, 2008, David East, Mr. Helgren's associate, was given complete access to Berg's documents and arranged to make copies of same. CP 427. Because it was late in the game for RSUI to still be evaluating coverage, Berg's defense counsel was understandably concerned and advised RSUI's counsel to direct all future requests to review documents to Berg's personal coverage counsel, Peter Petrich. CP 337, 427.

The mediation went forward on February 6 and 7, 2008. CP 333. Mr. Helgren attended on behalf of RSUI, but never offered to assist Berg in settling the claim. CP 333. During the mediation, Peter Petrich informed Mr. Helgren that RSUI's absolute refusal to participate in the mediation would probably result in Berg considering an assignment of its claim against RSUI in any settlement negotiations. RP 9/12/2008 13: 1-8. The mediation was ultimately unsuccessful. CP 333.

Thereafter, Berg's defense counsel received a demand from Vision One, and forwarded it to Mr. Frye at RSUI. CP 333, 342-43. The demand included a

stipulated judgment against Berg for $2.5 million which was broken down as follows: $1 million payable by Admiral, $500,000 payable by Berg personally, and the remaining $1 million payable only by RSUI with a covenant not to execute on any other assets of Berg other than the RSUI policy. CP 343. RSUI's counsel asked Berg's counsel whether these particular terms were acceptable to Berg, and Berg's counsel indicated that they were not. CP 7016. Following that date, RSUI never requested any information concerning the status of the case or the settlement negotiations, nor did RSUI do anything to provide assistance as the case moved toward trial. CP 333; 428. At this point in time, it was Berg's understanding that RSUI was denying coverage. CP 333. Consequently, and as recognized by the trial court, Berg was under no obligation to continue cooperating with RSUI. 9/15/2008 RP 54: 18-22. "It is an insurer's affirmative duty to investigate a claim before it denies coverage,...not the insured's duty to continue supplementing the record to an uninquisitive insurer." *Aecon Buildings, Inc. v. Zurich North America,* 572 F.Supp.2d 1227, 1236 (W.D.Wa. 2008) (citation omitted).

The record evidence demonstrates that there was nothing suspicious about the timing of Berg's decision to discontinue its cooperation with RSUI. RSUI had the opportunity to be as involved as it wanted to be, and has no one to blame but itself for "being in the dark" during the six months leading up to the settlement. RSUI was fully aware that its denial of coverage would result in the negotiation of a settlement that included an assignment against RSUI, and had even seen a demand from Vision One containing such an assignment. CP 333, 342-43.

Having made the decision to deny coverage, RSUI must live with the consequences of that decision, and cannot be heard to overturn a reasonable settlement based on nothing more than speculation and innuendo.

c. There is nothing suspicious about the fact that Berg ultimately settled for an amount higher than the amount contained in Vision One's February 2008 Demand.

RSUI contends that the increase between the amount of Vision One's February 2008 settlement demand and the amount of the ultimate settlement constitutes circumstantial evidence of fraud or collusion. This accusation is not borne out by the record. The amount of Vision One's February 2008 demand ($2.5 million) and the amount of the ultimate settlement ($3.3 million) differ by only $800,000. CP 213, 342-43. Had RSUI bothered to inquire into the status of the litigation during the six month period leading up to trial, it would have learned that there were significant developments in the case during that time. Between February and September of 2008, the parties engaged in substantial motion practice. CP 189; 3038-3050; 3346-3361; 3611-3623; 3778-3801; 3960-3967; 4212-4223; 4231-4238; 4401-4406; 4659-4673; 4732-4739; 4905-4917; 4922-4926; 4933-4937; 4989-4992; 5080-5109; 5159-5173; 5324-5325; 5334-5354; 5355-5367; 5384-5389; 5390-5393; 5425-5430; 5469-5474; 5528-5549; 5664-5668; 5669-5675; 6126-6156; 6190-6251; 6288-6329; 6330-6350; 6427-6469; 6481-6485. While Berg was able to eliminate Vision One's $500,000 claim for lost sales due to the market downturn, Berg was unable to eliminate Vision One's multi-million dollar claim for delay damages. CP 3358-59, 4994. Berg was also unsuccessful in eliminating Vision One's contract and product liability claims,

and was unable to obtain a ruling that Vision One was at fault for the collapse as a matter of law under the theory that a general contractor has a nondelegable duty to maintain a safe workplace. CP 12663-753, 4417-18. It was clear that both sides were well-prepared and that the jury was going to have a myriad of factual issues to determine, making it essentially impossible to predict the outcome of the trial with any certainty.

Moreover, just one week prior to the parties' settlement agreement, another personal injury lawsuit was filed against Berg, wherein the plaintiff demanded $800,000. 9/12/2008 RP 44: 1-2. There were also between 8 and 9 additional bodily injury claimants that had yet to file suit and the statute of limitations had yet to expire. 9/12/2008 RP 45: 11-17. Consequently, Berg was facing approximately $10 million of exposure with only $1 million of policy limits available and jury selection underway. CP 329. Even if Berg were only found 25% - 33% at fault, the company's excess exposure would be approximately $3.5 million, an amount that would bankrupt the company unless there was a successful bad faith claim. CP 329-330. In light of this evidence, a fair-minded, rational person would be persuaded to find that the difference in the amount of Vision One's February 2008 settlement demand and the amount of the ultimate settlement agreement was not the result of any fraud or collusion on the part of the settling parties. Accordingly, the trial court did not abuse its discretion and this Court should affirm the trial court's ruling.

d. The Trial Court Never Directed Berg to Provide Information to RSUI.

In a continuing attempt to mount a "circumstantial case" of fraud and collusion, RSUI maintains that Berg defied a direction from the trial court to provide information to RSUI. *See* Appellant's Brief at p. 26. However, RSUI fails to point to any evidence in the record demonstrating that such a direction was ever given. The hearing transcript of the September 12, 2008 reasonableness proceedings demonstrates that the trial court merely gave RSUI the weekend to "do whatever it need[ed] to do, homework-wise", to determine whether the terms of the settlement were reasonable. 9/12/2008 RP 11: 5-6, 53-12-13.

Moreover, at 4:08 p.m. on Friday, September 12, 2008, the legal assistant to Mr. East and Mr. Helgren sent an email to Berg's counsel requesting that they, "[p]ursuant to the Court's order directing that [RSUI] be prepared to contest the reasonableness of the settlement on Monday, September 15, 2008," forward all information pertaining to the liability of Berg, the claims against Berg that have been resolved in the proposed settlement, and how the figure of $3.3 million was determined, to RSUI's counsel via email by 9:30 a.m. on Monday, September 15, 2008. CP 456. Thus, by RSUI's own admission, the trial court merely directed RSUI to be prepared—it did not order Berg to produce specific information. CP 456. That notwithstanding, both Berg's defense counsel and Berg's personal counsel responded to RSUI's overly broad request. CP 458, 461. Berg's defense counsel even offered to make his records available for review on Saturday. CP 461. However, RSUI did not review those records prior to the September 15, 2008, hearing. 9/15/2008 RP 33: 6-17. RSUI's failure to take advantage of the

time that the trial court allotted hardly amounts to evidence of fraud and collusion on the part of the settling parties.

e. Berg Was Under No Obligation to Convince RSUI that Its Coverage Position Was Incorrect.

RSUI's contention that it made "repeated requests for information" after the February 2008 mediation is belied by the record. *See* Appellant's Brief at p. 8. In support of this contention, RSUI points to two letters Mr. Helgren wrote to Mr. Petrich. CP 12373; 12375. The first letter, written on April 4, 2008, consists of the following two sentences:

> Do you have any authority for your position that product liability claims are outside the scope of the residential exclusion? If so, I would appreciate receiving it.

CP 12373. The second letter, written on June 2, 2008, merely reiterates the request for any legal authority to support Berg's position that the residential exclusion does not preclude coverage. CP 12375. Mr. Petrich appropriately chose not to respond to these letters because RSUI had already denied coverage and it was not Berg's obligation to convince RSUI that it was mistaken. 9/12/2008 RP 13:12-16. *See Coventry Associates v. American States Ins. Co.,* 136 Wn.2d 269, 281, 961 P.2d 933 (1998) (recognizing that an insurer has an affirmative duty to investigate a claim before it denies coverage). Evidence that Berg chose to discontinue its cooperation with an insurer who had abandoned it in its our of need and left it to fend for itself when faced with approximately $10 million of exposure does not amount to substantial evidence of fraud or collusion and does not warrant a finding of abuse of discretion.

2. The Settlement Amount Is Supported by Substantial Evidence.

In addition to contesting the trial court's finding of no fraud or collusion, RSUI erroneously contends that the trial court erred in finding the settlement reasonable because there was no evidence to support the settlement amount. *See* Appellant's Brief at pp. 4, 14-15, 22-23. In particular, RSUI criticizes the lack of expert testimony or analysis supporting the $3.3 million settlement. *See* Appellant's Brief at pp. 14-15, 22-23. However, RSUI fails to point to any authority for the proposition that expert testimony is required.

An insured's settlement for an amount within the range of the evidence is reasonable. *Martin,* 141 Wn.App. at 621; *Meadow Valley Owners Ass'n v. St. Paul Fire & Marine Ins. Co.,* 137 Wn.App. 810, 822, 156 P.3d 240 (2007). The trial court considered multiple motions concerning the parties' liability theories and defenses, including multiple motions concerning Vision One's damage theories and calculations. CP 3354-61, 3728-29, 3791-96, 3960-67, 3968-4069, 4070-4144, 4236-37, 4247-55, 4259-4360, 4669-71, 5528-38, 5550-55, 6126-38, 6288-98. The trial court recognized that Vision One's damages involved a "huge question of fact". 9/15/2008 53:15-21. Nonetheless, the trial court found that Vision One had sufficient evidence to present its multi-million dollar delay damage claim to the jury. CP 4993-4997. In fact, at the time of trial, Vision One was prepared to present evidence of approximately $5 million of damages resulting from the collapse. CP 329.

In addition, the parties had stipulated that the apportionment of fault at any trial would bind the parties for purposes of the $4 million Thompson personal

injury claim. CP 1009-1015. Such apportionment would likely have a collateral estoppel effect with respect to the additional personal injury claimants, one of whom claimed damages of $800,000, and an additional 8 or 9 who had yet to file suit. 9/12/2008 RP 45:11-17. Thus, the range of evidence concerning Vision One's damages was approximately $0 to $5 million, with a possibility of an additional $5 million of exposure from the personal injury claims.

In light of the multitude of factual issues for the jury to decide, it would be impossible to predict the outcome of the trial with any certainty. Berg's counsel believed that Berg's defenses were solid, but even if Berg were only found to be 25%-33% at fault, the potential exposure would bankrupt Berg. CP 329. Because the trial court was more than aware of the evidence concerning Vision One's damage claim, and the potential litigation risks both sides faced, expert testimony concerning the settlement amount was unnecessary. The $3.3 million dollar settlement demonstrated substantial compromise on both sides, especially in light of the fact that it was for an amount substantially less than Vision One was prepared to present at trial, it eliminated any personal exposure to Berg, and it required Vision One to pledge its own assets and the assets of its insurers to indemnify and hold Berg harmless for all of the personal injury claims. Accordingly, the trial court did not abuse its discretion in finding the settlement agreement reasonable.

3. The Trial Court Considered the Strengths and Weaknesses of the Claims and Defenses at Issue.

RSUI challenges the trial court's reasonableness determination to the extent it did not consider the strengths and weaknesses of the parties' claims and

defenses. As set forth above, the trial court was hardly a stranger to the complex issues of the case. Between February of 2008 and September of 2008, the settling parties briefed and the trial court heard multiple summary judgment motions and motions to exclude evidence. CP 189; 3038-3050; 3346-3361; 3611-3623; 3778-3801; 3960-3967; 4212-4223; 4231-4238; 4401-4406; 4659-4673; 4732-4739; 4905-4917; 4922-4926; 4933-4937; 4989-4992; 5080-5109; 5159-5173; 5324-5325; 5334-5354; 5355-5367; 5384-5389; 5390-5393; 5425-5430; 5469-5474; 5528-5549; 5664-5668; 5669-5675; 6126-6156; 6190-6251; 6288-6329; 6330-6350; 6427-6469; 6481-6485. These motions involved the parties' claims, liability theories, defenses and damages. Moreover, the trial court expressly stated that it had considered the *Glover/Chaussee* factors, and found them to be satisfied. 9/15/2008 RP 11-14. In so ruling, the trial court recognized that the merits of Vision One's liability and Berg's relative fault all presented "a huge question of fact...we've argued about those facts at every legal issue that I had to decide. It's clearly, hotly contested." 9/15/2008 53:15-23. While RSUI contends that this necessarily makes the settlement unreasonable, the record evidence demonstrates to the contrary. Because so many claims survived summary judgment, because the parties were extremely well-prepared and because the parties vigorously litigated each and every issue, there was no way to predict the outcome of the trial with any certainty. This is precisely the type of situation in which a compromise is appropriate. Accordingly, the trial court did not abuse its discretion in finding the settlement reasonable.

4. There Is No Requirement that the Settling Parties Explain What Claims the Settlement Encompassed.

RSUI cites to no authority for its contention that the trial court erred in finding the settlement reasonable because the settling parties did not identify which claims were encompassed by the settlement agreement. That notwithstanding, RSUI's contention is contradicted by the settlement agreement itself. The settlement agreement expressly provides that Vision One and Berg mutually agreed to release each other from ***all*** claims between them with respect to the October 1, 2005 collapse. CP 212. The settlement agreement also required Vision One to indemnify and hold Berg harmless for all personal injury claims. CP 214. Consequently, despite the fact that they had no obligation to do so, Berg and Vision One did provide an explanation of the claims encompassed by the settlement.

C. The Trial Court Did Not Abuse Its Discretion in Denying RSUI's Motion to Continue the Reasonableness Hearing.

1. Six Days Notice Was Sufficient.

As a preliminary matter, it is important to note that the instant case is nothing like a situation where an insurer has no knowledge of a case until it is notified of the settlement. RSUI was on notice of the underlying litigation since 2006, and was in continuous contact with Berg's defense counsel during the year leading up to the February 2008 mediation. CP 337. Indeed, RSUI even attended the February 2008 mediation. CP 333. At that time, it became clear that RSUI was denying coverage. CP 333 Thereafter, RSUI never asked Berg for any information concerning the status of the case or the settlement negotiations. CP

333, 428. It is disingenuous of RSUI to blame Berg for its own failure to further investigate the claim.

That notwithstanding, RSUI had ample notice of the reasonableness proceedings. Vision One notified RSUI of the settlement on September 9, 2008. CP 187-205. The trial court subsequently scheduled the reasonableness hearing for September 12, 2008. 9/9/2008 RP 83-84. RSUI moved to intervene and requested that the hearing be continued until September 26, 2008. CP 385-90. The trial court was unwilling to postpone the reasonableness hearing that long, but gave RSUI until September 15, 2008, to "take some time to look at" the reasonableness of the settlement. 9/12/2008 RP 10:22-11:6. Thus, RSUI had six days to "do whatever it need[ed] to do, homework-wise", to determine whether the terms of the settlement were reasonable. 9/12/2008 RP 11: 5-6, 53-12-13.

In *Red Oaks Condominium Owners Ass'n v. Sundquist Holdings, Inc.*, the court held that an insurer who was given six days' notice of a reasonableness hearing, and just three days to review the settlement agreement itself, was afforded sufficient notice and time to prepare, and was not deprived of constitutional due process of law. 128 Wn.App. at 321. RSUI attempts to distinguish the *Red Oaks* decision by asserting that it involved an insurer who was more "fully involved in the case." *See* Appellant's Brief at p. 20. However, the record evidence demonstrates that RSUI was no stranger to the case and had the opportunity to be as involved as it wanted to be.

Indeed, Berg's defense counsel was in continuous contact with RSUI's claims representative, Don Frye, and had been providing him with all status

reports for over a year prior to the February 2008 mediation. 9/12/2008 RP 11: 19-20; CP 337. On February 5, 2008, Berg's defense counsel made its complete file available for RSUI's review. 9/12/2008 RP 12: 5; CP 333, 337. From February 5, 2008, until the time of the reasonableness proceedings, Berg's counsel did not receive any further requests from RSUI to review additional documents maintained at the office of Berg's defense counsel. CP 333, 428. When it became clear at the February 2008 mediation that RSUI was denying coverage, Berg was under no obligation to continue cooperating with RSUI. 9/15/2008 RP 54:20-22. RSUI is not entitled to more notice than the insurer in *Red Oaks* simply because it chose to put its head in the sand. Accordingly, the trial court did not abuse its discretion in denying RSUI's Motion to Continue the Reasonableness Hearing.

2. RSUI Failed to Come Forward with Any Evidence that Additional Time or Discovery Would Have Made a Difference.

As recognized by the trial court, the settlement at issue was the result of seven months of vigorous negotiations which took place at arms' length with the assistance of a mediator. A court may not infer bad faith, collusion or fraud merely based on innuendo and speculation alone. *Martin,* 141 Wn.App. at 623. However, innuendo and speculation are all that RSUI offered the trial court. Indeed, RSUI admits that it did not come forward with any direct evidence of fraud or collusion during the reasonableness proceedings, even after the trial court provided RSUI with an additional weekend to do whatever "homework" it needed to do. *See* Appellant's Brief at p. 25. There is nothing in the record to establish

that allowing RSUI to conduct a fishing expedition for an additional eleven days would have changed the outcome of the trial court's reasonableness determination. Consequently, the trial court did not abuse its discretion in denying RSUI's motion for continuance.

3. The Trial Court Could Not Have Continued the Reasonableness Hearing and Moved Forward with the Trial Without Berg.

RSUI would have this Court believe that the trial court could have postponed the reasonableness hearing and continued with the trial despite the fact that the settlement agreement was contingent on a finding of reasonableness. *See* Appellant's Brief at p. 21. RSUI is incorrect. Without a reasonableness determination, Berg would have been forced to participate in the trial until such time as a reasonableness determination had been made. This is more than a mere "inconvenience"—it flies in the face of Washington's policy of encouraging settlements. The motivation behind settlements is the elimination of risk and the reduction of fees and expenses. Forcing parties who have reached a settlement to participate in a trial would not only waste the resources of the parties and the court, it would also unnecessarily confuse the jury. Such a scenario is especially unacceptable where, as here, RSUI provided the Court with no reason to suspect that additional time or discovery would have led to any evidence of fraud or collusion. Thus, the trial court did not abuse its discretion in denying RSUI's Motion to Continue the Reasonableness Hearing.

D. RSUI's References to Matters Outside the Record Should Be Stricken.

On July 30, 2009, RSUI filed a Motion to Add Evidence to the Record. RSUI sought to add evidence which it obtained during discovery in a related coverage/bad faith action currently pending in federal court. Berg opposed the motion because the additional documents were not necessary to fairly resolve the issues on review, nor would they change the decision being reviewed. Commissioner Skerlec agreed and denied RSUI's motion. In derogation of Commissioner Skerlec's Order, RSUI continues to reference information outside of the record. *See* Appellant's Brief at p. 2, n. 1 and p. 13, n. 4. Such references are inappropriate and should be stricken.

V. CONCLUSION

The trial court's September 15, 2008 Order on Approval and Reasonableness of Settlement should be affirmed.

Respectfully submitted this 20th day of November, 2009.

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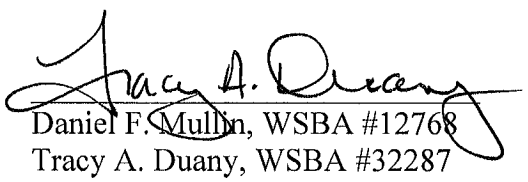

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No. 38411-6-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

VISION ONE, LLC, Plaintiff and Respondent,

v.

RSUI, Intervenor Below and Petitioner,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
Defendant and Respondent,

v.

D&D CONSTRUCTION, INC.; Defendant, Third-Party Plaintiff, and
Respondent,

v.

BERG EQUIPMENT & SCAFFOLDING CO., INC., Third-Party
Defendant and Respondent

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